IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 9

JOHN FRANCIS NOTO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. THE INSUFFICIENCY OF THE EVIDENCE.

The respondent acknowledges (Br. 36, n. 11) that the incitement-to-action standard of *Yates* v. *United States*, 354 U.S. 298, is applicable to the advocacy of the organization in a prosecution under the membership clause.[1] Accordingly, it is not disputed that the prosecution was required to prove that, within the statutory period, the Communist Party, to the knowledge of petitioner, advocated *action* for future forcible overthrow.

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[1] Contrary to respondent's contention (Br. 41-42, n. 15), it is clear that the court below held otherwise. This appears both from the explicit statement that the *Yates* test is "inapplicable" (R. 449) and from the failure of the court to mention or apply the test in delineating the issues and discussing the sufficiency of the evidence (R. 439-42, and see Pet. Br. 29-30).

A. *The Advocacy of the Communist Party.*

Our principal brief demonstrated (pp. 28-30) that the evidence of Party advocacy in this case differed in no material respect from that which *Yates* (at 329) held "strikingly deficient" and which the Second Circuit found insufficient in *United States* v. *Silverman*, 248 F. 2d 671, and *United States* v. *Jackson*, 257 F. 2d 830. We also showed (pp. 26-27) that the Government's action in procuring the dismissal of all but one of the nine Smith Act conspiracy cases which survived appellate review was an acknowledgment of its inability to supply the deficiency in the *Yates*, *Silverman* and *Jackson* records.

Respondent ignores the *Silverman* and *Jackson* decisions and its own action in the other conspiracy cases. It acknowledges (Br. 39, n. 12) that "the general pattern of the evidence in this case is similar to that in *Yates*." But in the same sentence, it asserts that the factual pattern in this case is "unique."

Respondent does not and cannot claim that there was anything unique in the testimony of Lautner, its principal witness on Party advocacy in this case as he was in *Yates*, *Silverman*, *Jackson* and every other Smith Act trial since *Dennis*. According to respondent (*ibid.*) the uniqueness of the present record resides in the testimony of five witnesses (Dietch, Hicks, Chatley, Regan and Greenberg) who did not appear in *Yates*. Respondent says that the "significant aspects" of this testimony relate to "industrial concentration and underground activities." There is nothing "unique" about the testimony of the five witnesses on these subjects. As respondent's own summary of the evidence shows, this testimony was merely cumulative of Lautner's. Cf. G. Br. 17-26 with Appdx. to G. Br. 66-68. Moreover, the witnesses added nothing to the evidence on "concentration" and the "underground" with which the *Yates* record was

replete. See Pet. Br. 29.[2] Similar evidence was likewise introduced in *United States* v. *Silverman, supra,* which disposed of respondent's present contentions as follows (at 685, n. 5):

> "The prosecution stresses the proof of industrial concentration and of concealment. But these do not rationally raise any inference that the appellants engaged in a plot to advocate insurrection at the time they were hiding and seeking factory jobs. The industrial concentration possibly suggests a conspiracy to commit sabotage, espionage or political strikes going beyond mere labor proselytizing; but it does not point very directly toward illegal exhortation. Similarly, concealment is consistent with any unpopular or illegal enterprise; but the jury could not tell the nature of the enterprise from the mere fact of concealment."

See also, *Ingram* v. *United States,* 360 U.S. 672, 679-80 and Pet. Br. 32-33.

Our principal brief demonstrated that a reversal would be required even if the evidence as to Party advocacy prior

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[2] *Yates* (at 331-32) did find that one item of evidence concerning the underground which was introduced in that case and directly connected with certain defendants might, if given "its utmost sweep," support a finding that forcible action was engaged in, not by the Party as such, but within a "particularly trustworthy group." This finding was based on the testimony of Scarletto that he had been surreptitiously taught methods of "moving masses of people in time of crisis." However, *Yates* held (at 329-30, 332), that this testimony did not supply the deficiency in the evidence concerning the advocacy of the Party as such. And see *United States* v. *Silverman, supra,* at 686-87. Moreover, there is no evidence in the present case of the kind introduced through Scarletto. Finally, the Government itself did not consider the Scarletto testimony sufficient to warrant a conspiracy conviction of the *Yates* defendants directly involved. For it dismissed the indictments against them after the Court remanded their cases for a new trial. Respondent's reliance on this aspect of the *Yates* decision (G. Br. 38-39) is therefor completely misplaced.

to September 1, 1951 could somehow be held to meet the *Yates* standard. For the only evidence of Party advocacy subsequent to that date and within the period not barred by the statute of limitations was offered by petitioner and establishes that the advocacy was peaceable. (Pet. Br. 30-31.)

Respondent does not and cannot cite any evidence of Party advocacy of forcible overthrow, even as a matter of abstract doctrine, within the limitations period.[3] Nor does it deny that the evidence introduced by petitioner showed that, within this period, the Party advocated a peaceful path to socialism.

Respondent (Br. 39-40), like the court below, invokes an inference that the Party's "character remained unchanged through the limitations period, in the absence of any evidence to the contrary." But the relevant issue is not the general "character" of the Party in the limitations period. What the statute requires is proof that, within this period, the Party performed certain verbal acts—i.e., utterances or publications of incitements to forcible overthrow.[4] The so-called presumption of continuance, however, applies only where "the existence of an object, condition, quality, or tendency at a given time is in issue." 2 Wigmore, Evidence (3d ed.), sec. 437. The presumption does not and cannot logically have application where the performance of an *act* at a given time is in issue. It would be nonsensical, for example, to contend that because an accused robbed a certain bank on three occasions in 1957, 1958 and 1959, he

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[3] Typically, respondent says (G. Br. 40, n. 13) that "the record contains fewer direct references to the Party's advocacy of action in the limitations period than before." In fact, the record contains no such references, direct or indirect, and respondent cites none.

[4] A single such act would be insufficient since it is only "the systematic teaching and advocacy of illegal action which is condemned by the statute." *Yates* v. *United States*, *supra*, at 331.

will be presumed to have robbed the same bank in 1960. It is equally nonsensical for respondent to argue that because, as it asserts, the Party advocated forcible overthrow on occasions prior to September 1, 1951, the jury was entitled to infer that the Party engaged in such advocacy on later occasions.

Furthermore, as shown in our principal brief (p. 31), a presumption of continuance, if otherwise permissible, was rebutted by petitioner's evidence of the Party's peaceable advocacy in the limitations period. Respondent argues (Br. 40-41) that the jury was entitled to find this advocacy insincere. But there was not a scintilla of evidence that Foster, the Party chairman, did not mean exactly what he wrote. In any event, it is not hypocrisy, but illegal advocacy that the prosecution must prove.

B. *The Knowledge and Intent of Petitioner.*

Our principal brief demonstrated (pp. 31-34) that, even assuming proof of illegal advocacy by the Party, the evidence concerning petitioner's knowledge and intent was palpably insufficient under *Nowak* v. *United States*, 356 U.S. 660; *Maisenberg* v. *United States*, 356 U.S. 670, and *Schneiderman* v. *United States*, 320 U.S. 118. Respondent studiously avoids mentioning these decisions. But its own analysis of the evidence (G. Br. 42-43) confirms our contention.

Respondent's failure to face up to the holdings in *Yates*, *Nowak*, *Maisenberg*, or *Schneiderman*, reveals its awareness that they are dispositive of the evidentiary issues. Candor would have compelled it to acknowledge as much and frankly to urge the Court to overrule these cases. Evidently respondent eschewed that course because it can advance no valid reasons for a departure from the Court's previous decisions. On respondent's own showing, there-

fore, a reversal is required. And for the reasons stated in our principal brief (p. 34) the Court should direct a judgment of acquittal.

2. The Erroneous Admission of Prejudicial Evidence.

A. In granting certiorari in this case, the Court undertook to review as question 3 "[w]hether the conviction was based on incompetent, irrelevant, remote and prejudicial evidence." See Pet. Br. 2. Nevertheless, respondent argues (Br. 45-46) that the Court should not consider this question because petitioner's timely trial court objections to the evidence were not pursued in the court below. Respondent advanced the same contention in opposing certiorari as to question 3. See Memorandum for the United States, No. 564 Misc., Oct. Term, 1958, pp. 4-5. The Court must therefore have rejected the contention when it included question 3 in the writ. This action accords with the decisions cited by respondent (Br. 45-46) that in a criminal case the Court will notice an error, not raised on appeal, if it affects the fairness of the trial.[5] Obviously, consideration of question

[5] Respondent's discussion of the circumstances under which the Court will refuse to notice errors not raised below (G. Br. 45-46) cites twelve decisions. In five of these, the Court ordered reversals for errors, which, in some instances, had not even been raised in the trial court. *Screws* v. *United States*, 325 U. S. 91, 107; *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16; *Gambino* v. *United States*, 275 U. S. 310, 319; *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 411-12; *Weems* v. *United States*, 217 U. S. 349, 362. In five of the remaining seven cases, the claim of error was not noticed because of circumstances other than or in addition to the failure to raise the question in the Court of Appeals. In two of these, the question was not presented in the petition for certiorari. *Lawn* v. *United States*, 355 U. S. 339; *Kessler* v. *Strecker*, 307 U. S. 22, 34. In one, the claim of error was found to be "without merit." *McLoughlin* v. *Raphael Tuck Co.*, 191 U. S. 267, 271. In two, the error was not raised in the trial court and in one of these the error was also found to be harmless. *United States* v. *Atkinson*, 297 U. S. 157, 160; *United States* v. *Socony Vacuum Oil Co., Inc.*, 310 U. S. 150, 239. Although the two remaining decisions were rested

3 is required to determine whether the admission of the evidence to which petitioner objects was erroneous and, if so, whether the errors resulted in the denial of a fair trial.

B. Our principal brief (pp. 35-39) demonstrated that petitioner's conviction was obtained primarily on evidence of third party acts and declarations outside of his knowledge, passages from books and articles which he had not read, and the opinions of an "expert" which he was not shown to have shared. Respondent's summary of Lautner's testimony (Appdx. to G. Br. 61-68), euphemistically designated as "evidence not specifically linked to petitioner," further documents our demonstration.

As we also showed (Pet. Br. 39-41), this evidence was incompetent and irrelevant. Accordingly, its admission denied petitioner a fair trial.

Respondent (Br. 52-53) dismisses our argument as without merit, citing *United States* v. *Dennis*, 183 F. 2d 201; *United States* v. *Mesarosh*, 223 F. 2d 449, rev'd on other grounds, 352 U.S. 1; *Frankfeld* v. *United States*, 198 F. 2d 679; *Scales* v. *United States*, 227 F. 2d 581, rev'd on other grounds, 355 U.S. 1; *Scales* v. *United States*, 260 F. 2d 21; *United States* v. *Lightfoot*, 228 F. 2d 861, rev'd on other grounds, 355 U.S. 2.

Dennis, *Mesarosh* and *Frankfeld* sustained the admission of third party declarations under the co-conspirator rule in cases where the indictment charged a conspiracy and where appropriate instructions on the application of the rule were given. The first *Scales* case held the co-

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solely on the failure to raise a claim of error in the Court of Appeals, the claims were minor or frivolous. *Husty* v. *United States*, 282 U. S. 694, 701-02; *Duignan* v. *United States*, 274 U. S. 195, 200.

conspirator rule applicable in a membership case, stating (at 592) that "a charge under the membership clause of the Smith Act is a charge of conspiracy."* This holding is erroneous. For as shown in our principal brief (p. 39), the co-conspirator rule is inapplicable where the indictment does not allege a conspiracy and where the accused is not afforded the protection of the instructions required in conspiracy cases. Furthermore, as respondent asserts when defending the sufficiency of the evidence (G. Br. 36, n. 11), indictments under the membership clause do not require proof that the accused "personally conspired to engage in the forbidden advocacy." Thus, respondent itself disputes the proposition on which the *Scales* decision was based—i.e., that an indictment under the membership clause "is a charge of conspiracy."

Respondent says (Br. 52) that if the character of the Communist Party can be established only by evidence of matters within the knowledge of the accused, "the nature of the Party, a material issue, could never be proved." This is so, according to respondent (*ibid.*), because "the Party is by definition a group [a]nd the group's character could not be shown by examining only the acts and statements of an individual member in isolation."

This argument involves respondent in a fatal contradiction. On the one hand, respondent has always conceded that the membership clause does and, constitutionally, must require proof that the petitioner had knowledge that the Communist Party was engaged in proscribed advocacy. Further, respondent insists that it proved guilty knowledge in the only way that knowledge can be proved—by evidence of "petitioner's words, deeds and history" (G. Br. 44). On the other hand, as we have just seen, respondent asserts

* The second *Scales* decision (at 39, and see at 26) relied on the holding on this point in the prior case.

that the character of the Party's advocacy cannot be proved "by the acts and statements of an individual member." But if that is true, it can never be shown that petitioner had guilty knowledge. Thus, respondent argues that an element of the offense which it agrees must be proved and claims has been proved is impossible of proof. This is schizophrenic thinking.

C. Respondent's defense of the admissibility of Lautner's opinion testimony on the crucial question of force and violence is based on a gross mis-statement of the record. Respondent says that Lautner testified that "the Party advocated that this change to socialism and the establishment of the dictatorship of the proletariat 'particularly in a highly developed country like the United States cannot be achieved peaceful[ly]' but only by 'force, challenge and violence'" (G. Br. 63).

The pertinent passage from Lautner's testimony appears at R. 194-95. The witness first testified that the "ultimate aim of the Communist Party" is "to destroy capitalism, monopoly capitalism, and achieve its final objective, establishment of socialism through the dictatorship of the proletariat." Up to that point, Lautner had said nothing about force and violence. Thereupon, the following occurred (R. 195):

"Q. In that final stage what will the Party resort to with respect to force and violence?

"Mr. McDonough: I object to it, if the Court please, on the ground it is speculative.

"The Court: I want it clear. You are asking for his opinion.

"Mr. Henderson: That is correct.

"A. This change, and the establishment of the dictatorship of the proletariat, particularly in a highly de-

veloped country like the United States, cannot be achieved peaceful. It will be achieved by force, challenge and violence . . . "

Contrary to respondent's assertion, therefore, Lautner did not testify that the Communist Party advocated forcible overthrow. Nor did he even testify that the Communist Party contemplated that resort to force would ultimately be required. All that the witness did was to vouchsafe his own personal opinion that socialism cannot be achieved in this country by peaceful means. For the reasons stated in our principal brief (p. 35) this opinion patently inadmissible.

Respondent defends the admission of Lautner's testimony that certain provisions of the constitution of the Party were "double talk" on the ground that the witness "was in a position to acquire knowledge of the common understanding of its members" (G. Br. 50). However, as our principal brief pointed out (p. 36, n. 22), Lautner did not testify as to the understanding of Party members but limited his answer to "initiates" whom he did not define. Respondent relies (Br. 50) on *United States* v. *Dennis*, 183 F. 2d 201, 229. We think the holding there erroneous. In any event, it is inapplicable. The reasoning of the court was that since a statement by a conspirator as to his understanding of Communist terminology would have been relevant to the mutual understanding of the conspirators and competent against all of them, the conclusion of a witness, drawn from such statements, was likewise admissible. Accordingly, the decision was based on the co-conspirator rule which, as we have shown, has no application to a prosecution under the membership clause.[7]

[7] That the ruling was based on conspiracy law is apparent from the form of the question put to the witness as well as from the decision. After reading a provision of the Party constitution, the

Our principal brief (p. 36) showed that Lautner's inflammatory testimony about the executions of Eastern European Communist leaders was patently incompetent and irrelevant. Respondent argues (Br. 50-51) that the testimony was properly received to "explain" a reference in an article in *Political Affairs* to the "*ideological and political* struggle"[8] against the position of the Yugo Slav Party. However, there is no evidence that petitioner was aware of the existence of the article,[9] much less that he knew of or agreed with Lautner's "explanation" or shared the witness' lurid appraisal of events in Eastern Europe. Moreover, Lautner was not asked about and did not testify to the Party's understanding of the reference in the article to the Yugo Slav matter, and there is not the slightest basis in the record for attributing the personal opinion of this embittered renegade from Communism to Party members or leaders, let alone to petitioner. Finally, nothing in Lautner's testimony indicates that, even in his opinion, the controversy with the Yugo Slav Party was related in any way to advocacy of the forcible overthrow of capitalist governments.

3. The Unconstitutionality of the Statute.

A. *Face Invalidity.*

Respondent (Br. 55) rests on its briefs in *Scales* for a defense of the constitutionality of the membership clause on its face. Hence it does not discuss our contention (Pet.

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witness was asked: "What did you in connection with the other Communists [including a number of the defendants] that you were working with there [at the convention which adopted the constitution] understand that to mean." See the printed record in *Dennis*, p. 3635.

[8] Respondent deletes the italicized words from its quotation from the article (G. Br. 31, R. 186).

[9] The sole foundation for its receipt in evidence was the fact that it had appeared in an official Party publication (R. 181-82).

Br. 69-75) that the membership clause cannot be analogized to a conspiracy statute and is therefore unconstitutional because it imputes guilt solely from association. However, in discussing the sufficiency of the evidence in the present case (G. Br. 36, n. 11), respondent stresses the fact that it is unnecessary, under the membership clause, "to prove that *the defendant* personally conspired to engage in the forbidden advocacy" (emphasis in the original). Thus, respondent acknowledges that the membership clause authorizes a conviction without proof that the accused conspired. Accordingly, as our principal brief argued, the statute cannot be sustained as a conspiracy law.

B. *Application.*

Respondent's contention (Br. 55-57) that the activities of petitioner and the Party "constituted a significant danger" within the limitations period is based on what we have shown to be a fallacious view of the evidence and inferences which have no foundation in the record. See Pet. Br. 65-66 and point 1, *supra*.

Respondent says (Br. 58) that petitioner had "the active purpose to help the Party achieve its unlawful objectives." But no issue concerning the nature of petitioner's activity in the Party was submitted to the jury. Respondent argues (*id.*, n. 17) that the "factor of 'activity'" as defined by it "was comprehended within the term 'membership' in the indictment and charge." This is an afterthought. There is no indication in the record that respondent's present interpretation of "membership" had even been conceived of by the prosecution or the court at the time of the trial, and the jurors could not possibly have been aware of it, even crediting them with the power of telepathy. Moreover, a jury finding that petitioner was "active" in the sense now defined by respondent would not support the conclusion that his activity was in furtherance of an unlawful Party objective. For respondent's "activity factor"

is satisfied by evidence of activity in furtherance of innocent Party objectives. See Pet. Br. 72-73.

Respondent contends (Br. 57-58) that petitioner's conviction may be sustained even though his activities "may seem insignificant." This is so, according to respondent, for the same reason that "the nation's commerce may be protected by dealing with individual instances which taken alone lack consequence." But, of course, the clear and present danger doctrine is inapplicable to regulations of commerce which do not impinge on First Amendment rights.[10] Accordingly, the decisions to which respondent refers are wholly irrelevant to the issue here. Respondent's contention is a repetition of the thesis, advanced in its brief on reargument in *Scales* (p. 32), that the "danger" in this case is to be measured by the aggregate contributions made by all "active" Party members to the Party's alleged unlawful advocacy. We examined this thesis in our principal brief (pp. 62-64) and showed that it was fallacious. We also pointed out (p. 66) that there was no evidence of activity within the limitations period by any party member other than petitioner, and respondent can cite none. Accordingly, if petitioner's own activities were "insignificant," and respondent seems to concede that they were, the clear and present danger doctrine requires a reversal of his conviction. See Pet. Br. 57-62.

Our principal brief (pp. 66-69) urged that a reversal is also required because the tense international situation which was essential to the finding of a clear and present

[10] Cf. *American Communications Association* v. *Douds*, 339 U.S. 382, involving a regulation of commerce that did impinge on First Amendment rights. *Douds* (at 402, 404) sustained section 9(h) of the Taft-Hartley Act only because, unlike the membership clause, it "does not prevent or punish by criminal sanctions . . . the affiliation with any organization . . . touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint," and "leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions."

danger in *Dennis* v. *United States*, 341 U.S. 494 had ceased to exist at the time of petitioner's indictment. Respondent (Br. 58-59) characterizes this contention as "obviously without substance," apparently on the ground that it is sufficient for clear and present danger purposes that the touch and go nature of our relations with the Soviet Union found in *Dennis* (at 511) persisted into some portion of the limitations period. But, under the interpretation given the clear and present danger doctrine by *Dennis*, it is the nature of the external conditions in existence *at the time of the indictment* and not during a preceding period which is determinative. Judge Hand so stated,[11] and his conclusion is inherent in the *Dennis* formulation of the doctrine.

Dennis did not hold that the then "inflammable nature of world conditions" created a *present* danger of an attempt at forcible overthrow. It found, as a probability, that these conditions would lead to a war crisis which, in turn, would provide the occasion for an attempt at forcible overthrow. As Judge (now Justice) Harlan put it, Judge Hand's finding on external conditions was based "on a combination of factors from which he estimated the probability of some crisis or extreme tension which might present the awaited opportunity." *United States* v. *Flynn*, 216 F. 2d 354, 367. *Dennis* held that this estimated probability was sufficient to satisfy the clear and present danger doctrine.[12]

However, at the time of petitioner's indictment late in 1954, the absence of any "active battlefield anywhere in the world" and "other developments favorable to the maintenance of peace"[13] made the war crisis which *Dennis*

[11] ". . . the question is how imminent: that is how probable of execution [the conspiracy] was in the summer of 1948, when the indictment was found." 181 F. 2d 201, 213.

[12] This reformulation of the doctrine was sharply criticized by both the concurring and dissenting Justices. See *Dennis* v. *United States, supra*, at 551, 570, 580, 585.

[13] Statement by President Eisenhower in October, 1954. See Pet. Br. 67.

predicted improbable of occurrence. The estimate on which *Dennis* predicated its clear and present danger finding had been proved by events to be incorrect. Accordingly, no constitutionally requisite danger, even in the *Dennis* sense of "clear and probable," existed at the time of petitioner's indictment.[14] Moreover, the wisdom of hindsight made it evident that no such danger had ever existed.

Nevertheless, respondent argues that the conviction may be sustained because the world conditions on which *Dennis* had based its prediction continued unchanged during a portion of the limitations period. But that fact became irrelevant, once developments prior to the return of the indictment demonstrated that the prediction was unsound. Certainly, the Court will not give greater deference to its own prophecies than to those of Congress. And, as *Chastleton Corporation* v. *Sinclair*, 264 U.S. 543, 547, stated with reference to the Congressional declaration of emergency involved in that case:

> "We repeat what was said in *Block* v. *Hirsh*, 256 U.S. 135, 154, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events."

Respectfully submitted,

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[14] This was not the case in *United States* v. *Flynn*, *supra*, cited by respondent (Br. 59) where the indictment was returned in 1951 during the pendency of the war in Korea.

SUPREME COURT OF THE UNITED STATES

No. 9.—October Term, 1960.

John Francis Noto, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 5, 1961.]

Mr. Justice Harlan delivered the opinion of the Court.

This case, like *Scales* v. *United States*, No. 1, *ante*, p. —, was brought here to test the validity of a prosecution under the membership clause of the Smith Act. — U. S. —. The case comes to us from the Court of Appeals for the Second Circuit which affirmed petitioner's conviction in the District Court for the Western District of New York, after a jury trial. 262 F. 2d 501.

The only one of petitioner's points we need consider is his attack on the sufficiency of the evidence, since his statutory and constitutional challenges to the conviction are disposed of by our opinion in *Scales;* and consideration of his other contentions is rendered unnecessary by the view we take of his evidentiary challenge.

In considering that challenge we start from the premise that Smith Act offenses require rigorous standards of proof. *Scales, ante,* p. —. We find that the record in this case, which was tried before our opinion issued in *Yates* v. *United States*, 354 U. S. 298, bears much of the infirmity that we found in the *Yates* record, and requires us to conclude that the evidence of illegal Party advocacy was insufficient to support this conviction.

A large part of the evidence adduced by the Government on that issue came from the witness Lautner, and the reading of copious excerpts from the "communist

classics." This evidence, to be sure, plentifully shows the Party's teaching of abstract doctrine that revolution is an inevitable product of the "proletarian" effort to achieve communism in a capitalist society, but testimony as to happenings which might have lent that evidence to an inference of "advocacy of action" to accomplish that end during the period of the indictment, 1946–1954, or itself supported such an inference, is sparse indeed. Moreover, such testimony as there is of that nature was not broadly based, but was limited almost exclusively to Party doings in western New York, more especially in the cities of Rochester and Buffalo, the scene of petitioner's principal Party activities. Further, the showing of illegal Party advocacy lacked the compelling quality which in *Scales*, *ante*, p. —, was supplied by the petitioner's own utterances and systematic course of conduct as a high Party official. We proceed to a summary of this testimony.

The witness Dietch described mainly episodes from his indoctrination as a member of the Rochester Young Communist League during the years 1935–1938. In that time he knew petitioner, with whom he had gone to high school, and testified that petitioner, then a youth, was an active and convinced member of the League. Apart from those early years, Dietch's testimony as to the Party and the petitioner referred to one other possibly relevant episode, when, in 1951, he obtained for the Party at petitioner's request two pieces of special printing equipment for which petitioner paid $100 and $200. However, this episode is deprived of significance when it appears from the witness' testimony that petitioner explained to him at the time that pressure brought to bear on the Party had made it difficult for it to get its printing done by conventional commercial means.

The witness Geraldine Hicks had joined the Party in 1943 at the request of the F. B. I. and continued to be involved with it until 1953. She knew petitioner in con-

nection with his work as Chairman of the Erie County Communist Party from 1946 until 1950. Her testimony related to classes and meetings which she attended in the Buffalo area, where the "communist classics" were used for teaching purposes. Extensive passages from these works were read into evidence. She also testified as to the importance attributed by the local Party to its "industrial concentration" work and to its recruitment of workers in those industries as well as to the importance attributed to the recruitment of Negroes.

The witness Chatley, who was a bus driver during the period of his Communist Party membership from 1949 onwards, testified to his contacts with petitioner and other Party members in the Buffalo area. He testified to Party teachings as to the importance of receiving solid support from the labor unions. He was given various items of literature such as the History of the Russian Revolution and The Proletarian Revolution and the Renegade Kautsky, which latter dealt with an early Communist who had been singled out for condemnation because of his views that communism could be achieved ultimately by peaceful means. He was told by petitioner that "if I would reread the book[s], most of my questions would be answered. He said if there were any points I did not understand he would be happy to clear them up at a later visit." Perhaps the most significant item of Chatley's testimony dealt with an interview with petitioner, at which Chatley was requested to hide out a Party member who was fleeing the F. B. I. in connection with "what the newspapers called this Atom Spy Ring business." So far as the record reveals, the plans never progressed beyond this request. The petitioner had also told Chatley that the Federal Government was building concentration camps:

> ". . . He said that they are not building them for ornamental purposes. He said 'They are going to fill

> them with our people, starting with the leaders.' . . . He said that he expected that when they were ready he would be one of the first people to go. He said the Federal Government would continue with these camps and fill them with a lot of people, but the time would come when there would be a show-down, working people will stand just so much. It might take several years, it will result in bad times, but in the end it will result in a turn in the country to Marxism and Leninism. He said then his part might be in it, he was willing to suffer anything to bring it to that glorious end."

Certainly the most damaging testimony came from the witness Regan, who as a government agent and Party member from 1947 in the Buffalo-Rochester area gathered considerable information on the Party's "industrial concentration" program in that area. Regan, at the request of petitioner, attended a Party meeting in New York City on creating a Party commission in the United Auto Workers. The conference concerned the penetration of the United Auto Workers, and plans were made for getting people into various shops in automobile plants in the State, who could later assume positions of leadership in the union. At a later date petitioner also discussed the penetration of an automobile plant in the area by Party members sent up from New York City. Regan also received a pamphlet, but not from the petitioner, dealing with the concentration program in the steel industry. The pamphlet stated at one point:

> "1. Three basic industries, steel, railroad and mining. These are basis [*sic*] to the National Economy, that is if any one or all three are shut down by strike our economy is paralyzed. It is necessary for a Marxist revolutionary party to be rooted in these industries."

In 1949 Regan attended a conference in Rochester at which the petitioner spoke: "He discussed concentration work, and he said the task of the Party was to build the Party within the shop in Buffalo . . . he specifically mentioned both steel and Westinghouse electric." Another speaker said that "steel was a basic industry, by basic he said the entire section of industry within the country depended on steel." Regan also attended a conference in New York City at which petitioner spoke:

> ". . . He said a Lenin method of work within the shop was to decide upon the particular dependent within the shop, that the shop as a rule depended upon, to suspend production, it was the job of every communist to know the people, executives and product of the company, if possible to direct his attention on the key department, better still to get a job in the key department."

Several other passages in Regan's testimony should be adverted to for their bearing on the tone of the record before us. Speaking of the war in Korea, Regan testified that the petitioner had said at the conference of the Upstate District of the Party in 1950:

> ". . . the war . . . was caused by an aggressive action of the United States, American troops would follow Wall Street policy. He said it is possible for this to break out in other parts of the world. He mentioned the Near East.
>
> "Q. Is that all?
>
> "A. Yes."

No effort was made to link up this conference with particularly trusted Party members, but it does appear that it was at this conference that plans were laid for building a Communist Party club "on the railroad."

Regan also testified to a remark made at another Party conference by a lecturer that a "social democrat was an evolutionist who waited for socialism where the Communist Party would achieve socialism through revolutions." At this same meeting the lecturer recounted an incident that had occurred at a class she had once taught in New Rochelle, New York, at an unspecified time:

> ". . . She said a person at this class, they were discussing the Soviet Union, asked her if it would be possible for him to own twenty pairs of shoes in the Soviet Union. She made the statement he was the kind of guy they hoped to shoot some day."

The witness recalled a similar intemperate remark by the petitioner, during a meeting in 1947:

> "Lumpkin [a Party member] was talking about a visit to his home by a local newspaper reporter. He said the reporter came to his home. They let him in and answered a lot of questions. . . .
> "John Noto said Lumpkin should never let the reporter into his house. Should not have answered any questions. He said "Sometime I will see the time we can stand a person like this S. O. B. against the wall and shoot him."

The witness Greenberg testified largely about the Party program in the upstate area as to setting up printing and mimeographing equipment in case commercial channels were cut off or the Party was forced underground; and three other witnesses testified briefly to the effect that they had known petitioner when he had moved to Newark, New Jersey, and obtained a job under an assumed name as a helper or stockkeeper in the Goodyear Rubber Products Corporation factory, in connection with which he used a false Social Security number.

Finally, there was testimony through the witness Lautner as to the Party's underground organization in

northern New York, including petitioner's participation therein as one of the three Party members in charge.

We must consider this evidence in the light most favorable to the Government to see whether it would support the conclusion that the Party engaged in the advocacy "not of . . . mere abstract doctrine of forcible overthrow, but of action to that end, by the use of language reasonably and ordinarily calculated to incite persons to . . . action" immediately or in the future. *Yates* v. *United States*, *supra*, at 315–316. In that case we said:

> ". . . The essence of the Dennis holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of violent overthrow, to violence as a 'rule or principle of action' and employing 'language of incitement' . . . is not constitutionally protected . . . . This is quite a different thing from the view of the District Court here that mere doctrinal justification of forcible overthrow, if engaged in with intent to accomplish overthrow, is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*. As one of the concurring opinions in *Dennis* put it: 'Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken.'" *Id.*, at 321–322.

The great bulk of the evidence in this record seems to us to come within the purview of the first of the contrasted

alternatives elaborated in the concurring opinion in *Dennis*, 341 U. S., at 545, and referred to in the passage just quoted. We held in *Yates*, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.

Surely the off-hand remarks that certain individuals hostile to the Party would one day be shot cannot demonstrate more than the venomous or spiteful attitude of the Party towards its enemies, and might indicate what could be expected from the Party if it should ever succeed to power. The "industrial concentration" program, as to which the witness Regan testified in some detail, does indeed come closer to the kind of concrete and particular program on which a criminal conviction in this sort of case must be based. But in examining that evidence it appears to us that, in the context of this record, this too fails to establish that the Communist Party was an organization which presently advocated violent overthrow of the Government now or in the future, for that is what must be proven. The most that can be said is that the evidence as to that program might justify an inference that the leadership of the Party was preparing the way for a situation in which future acts of sabotage might be facilitated, but there is no evidence that such acts of sabotage were presently advocated; and it is *present* advocacy, and not an intent to advocate in the future or a conspiracy to advo-

cate in the future once a groundwork had been laid, which is an element of the crime under the membership clause. To permit an inference of present advocacy from evidence showing at best only a purpose or conspiracy to advocate in the future would be to allow the jury to blur the lines of distinction between the various offenses punishable under the Smith Act.

The kind of evidence which we found in *Scales* sufficient to support the jury's verdict of present illegal Party advocacy is lacking here in any adequately substantial degree. It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party. See *Yates*, *supra*, at 330.

Although our conclusion renders unnecessary consideration of the evidence as to petitioner's personal criminal purpose to bring about the overthrow of the Government by force and violence, a further word may be desirable. While evidence of the industrial concentration program, in which petitioner was active, does not alone justify an inference of the Party's present advocacy of violent overthrow, it may very well tend to show the quite different element of the petitioner's own purpose. Even though it is not enough to sustain a conviction that the Party has engaged in "mere doctrinal justification of forcible overthrow . . . [even] with intent to accomplish overthrow," *Yates*, *supra*, at 321, it would seem that such a showing might be of weight in meeting the requirement that the particular defendant in a membership clause prosecution had the requisite criminal intent. But it should also be said that this element of the membership crime, like its others, must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be

punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

In view of our conclusion as to the insufficiency of the evidence as to illegal Party advocacy, the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE BRENNAN and THE CHIEF JUSTICE would remand to the District Court with direction to that court to dismiss the indictment. For the reasons expressed in MR. JUSTICE BRENNAN's dissent in *Scales* v. *United States*, *ante*, p. ——, they believe that this prosecution was barred by § 4 (f) of the Internal Security Act. They also believe that the dismissal is required because of the insufficiency of the evidence.

SUPREME COURT OF THE UNITED STATES

No. 9.—October Term, 1960.

Jonn Francis Noto, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 5, 1961.]

Mr. Justice Black, concurring.

In 1799, the English Parliament passed a law outlawing certain named societies on the ground that they were engaged in "a traitorous Conspiracy . . . in conjunction with the Persons from Time to Time exercising the Powers of Government in *France* . . ." [1] One of the many strong arguments made by those who opposed the enactment of this law was stated by a member of that body, Mr. Tierney:

> "The remedy proposed goes to the putting an end to all these societies together. I object to the system, of which this is only a branch; for the right hon. gentleman has told us he intends to propose laws from time to time upon this subject, as cases may arise to require them. I say these attempts lead to consequences of the most horrible kind. I see that government are acting thus. Those whom they cannot prove to be guilty, they will punish for their suspicion. To support this system, we must have a swarm of spies and informers. They are the very pillars of such a system of government." [2]

[1] 39 George III, c. 79. For a more complete discussion of the provisions of this law and the arguments surrounding its enactment, see my dissenting opinion in *Communist Party* v. *Subversive Activities Control Board*, decided today, *ante*, —, at —.

[2] See Parliamentary Debates, Hansard, 1st Series, 34, at 991. Cf. *De Jonge* v. *Oregon*, 299 U. S. 353, 365: "The greater the importance

The decision in this case, in my judgment, dramatically illustrates the continuing vitality of this observation.

The conviction of the petitioner here is being reversed because the Government has failed to produce evidence the Court believes sufficient to prove that the Communist Party presently advocates the overthrow of the Government by force. The Government is being told, in effect, that if it wishes to get convictions under the Smith Act it must maintain a permanent staff of informers who are prepared to give up-to-date information with respect to the present policies of the Communist Party. Given the fact that such prosecutions are to be permitted at all, I do not disagree with the wisdom of the Court's decision to compel the Government to come forward with evidence to prove its charges in each particular case. But I think that it is also important to realize the overriding pre-eminence that such a system of laws gives to the perpetuation and encouragement of the practice of informing—a practice which, I think it is fair to say, has not always been considered the sort of system to which a wise government would entrust the security of a Nation. I have always thought, as I still do think, that this Government was built upon a foundation strong enough to assure its endurance without resort to practices which most of us think of as being associated only with totalitarian governments.

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of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

I cannot join an opinion which implies that the existence of liberty is dependent upon the efficiency of the Government's informers. I prefer to rest my concurrence in the judgment reversing petitioner's conviction on what I regard as the more solid ground that the First Amendment forbids the Government to abridge the rights of freedom of speech, press and assembly.

SUPREME COURT OF THE UNITED STATES

No. 9.—October Term, 1960.

John Francis Noto, Petitioner, v. United States. On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 5, 1961.]

MR. JUSTICE DOUGLAS, concurring.

The utterances, attitudes, and associations in this case, like those in *Scales v. United States*, *ante*, p. ——, are in my view wholly protected by the First Amendment and not subject to inquiry, examination, or prosecution by the Federal Government.

For that reason, as well as for the one mentioned by MR. JUSTICE BRENNAN, I would remand the case to the District Court with directions to dismiss the indictment.